

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HYUNG BYUM KIM, EUN JUNG KANG,
EO YEON HWANG and DOO HONG KIM

Appeal No. 2006-1952
Application No. 09/750,744

ON BRIEF

Before OWENS, CRAWFORD and LEVY, *Administrative Patent Judges*.
OWENS, *Administrative Patent Judge*.

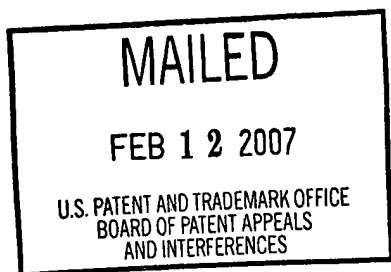
DECISION ON APPEAL

The appellants appeal from a rejection of claims 23-37, which are all of the pending claims.

THE INVENTION

The appellants claim an absorbent article having a liquid pervious cover including a hydroentangled, hydroapertured spun-lace material. Claim 23 is illustrative:

23. An absorbent article, comprising
a liquid pervious cover;
an absorbent core; and



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an intake intensifier pledget located on a central portion of the absorbent core;

wherein

the cover includes a hydrogentangled,hydroapertured spun-lace material;

the pledget includes a Thru-Air Bonded Carded Web material;
and

the Thru-Air Bonded Carded Web material has a basis weight of between about 15 g/m² and about 70 g/m².

THE REFERENCES

Jackson et al. (Jackson)	5,643,240	Jul. 1, 1997
Reiter et al. (Reiter)	5,769,834	Jun. 23, 1998
Hamajima et al. (Hamajima)	6,326,525	Dec. 4, 2001

(filed Apr. 21, 1998)

THE REJECTIONS

The claims stand rejected under 35 U.S.C. § 103 as follows:
claims 23-33, 35 and 37 over Hamajima in view of Jackson,¹ and
claims 34 and 36 over Hamajima in view of Jackson and Reiter.

OPINION

We reverse the aforementioned rejections and remand the application to the examiner.

¹ In the statement of the rejection in the examiner's answer, the claims rejected over Hamajima in view of Jackson are stated incorrectly as "27-33, 25 and 37" (page 3).

Regarding the rejections, we need to address only the independent claims, i.e., claims 23 and 37.² Those claims require an absorbent article having a cover including a hydroentangled, hydroapertured spun-lace material.

Hamajima discloses (col. 1, lines 53-55; col. 3, line 36; fig. 2A) an absorbent article having a liquid permeable topsheet (23), an absorptive portion (33) and, in a central region of the absorptive portion, two layers (an absorbent member (24) and a second absorbent layer (27)) which the examiner relies upon as being a two layer pledget (answer, page 4). The topsheet can be an apertured nonwoven fabric (col. 4, line 59 - col. 5, line 1).

Jackson discloses an absorbent article having a fibrous, nonwoven separation layer (26) (col. 4, lines 35-36) which the examiner relies upon as being a pledget (answer, page 4). The separation layer readily desorbs fluid from the surface of the absorbent article and transfers it to an absorbent core (16) (col. 4, lines 37-40). Jackson teaches that it is important for the separation layer to maintain its loftiness, and that through-air bonding does not adversely affect loft (col. 4, lines 18-23). The separation layer can include a through-air bonded carded

² The examiner does not rely upon Reiter for any disclosure that remedies the deficiency in Hamajima and Jackson as to the independent claims.

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stable fiber bicomponent web having a basis weight of 27 g/m²
(col. 6, lines 53-56).

The appellants argue that Hamajima's disclosure of an apertured nonwoven fabric is insufficient for disclosing or suggesting a hydroentangled, hydroapertured spun-lace material (brief, page 7; reply brief, pages 2-3).

The examiner argues (answer, page 4):

With respect to the cover layer being hydroentangled and hydroapertured: Hamajima discloses the topsheet being an apertured nonwoven fabric (column 5, line 1), therefore being apertured and entangled (due to the fabric being a nonwoven web), the formation of the apertures and entanglement are Product-by-Process limitations, and these limitations are not limited to the manipulations of the steps, only the structure implied by these steps (see MPEP 2113). It follows that if the product in the claim with the product-by-process limitation is the same as the product of the prior art, the claim is unpatentable even though the prior art was made by a different process. Therefore, cover layer being entangled and apertured using a hydro method or means, is anticipated in the Hamajima reference.

The examiner is correct that if a claimed product made according to a process-by-product limitation is the same as a prior art product, the product-by-product limitation does not patentably distinguish the claimed product over the prior art product. However, the examiner has the initial burden of establishing a prima facie case of unpatentability by providing evidence or reasoning which indicates that the appellants' product and the prior art product are identical or substantially identical. See

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In re Thorpe, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985); *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977). The examiner has not provided the required evidence or reasoning which shows that apertured nonwoven fabrics, in general, are identical or substantially identical to hydroentangled, hydroapertured spun-lace fabrics. Also, the examiner has not established that Hamajima's disclosure of an apertured nonwoven fabric would have fairly suggested a hydroentangled, hydroapertured spun-lace fabric to one of ordinary skill in the art.

The examiner, therefore, has not carried the burden of establishing a prima facie case of obviousness of the appellants' claimed invention.

Remand

We remand the application for the examiner and the appellants to address on the record whether Hamajima's disclosure of an apertured nonwoven fabric, alone or in combination with other prior art, would have fairly suggested, to one ordinary skill in the art, a hydroentangled, hydroapertured spun-lace material.³

³ Absorbent article topsheets comprising spun-lace (i.e., hydroentangled), hydroapertured material appear to have been conventional in the art at the time of the appellants' invention. See, e.g., U.S. 5,431,643 to Ouellette et al. (col. 4, line 68 - col. 5, line 4).

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DECISION

The rejections under 35 U.S.C. § 103 of claims 23-33, 35 and 37 over Hamajima in view of Jackson, and claims 34 and 36 over Hamajima in view of Jackson and Reiter, are reversed. The application is remanded to the examiner.

This remand to the examiner pursuant to 37 CFR § 41.50(a)(1) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)) is made for further consideration of a rejection. Accordingly, 37 CFR § 41.50(a)(2) applies if a supplemental examiner's answer is written in response to this remand by the Board.

REVERSED and REMANDED

Terry J. Owens
TERRY J. OWENS
Administrative Patent Judge

MURRIEL E. CRAWFORD
Administrative Patent Judge

STUART S. LEVY
Administrative Patent Judge

BOARD OF PATENT
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